Nos. 14-614 & 14-623

IN THE

Supreme Court of the United States

W. KEVIN HUGHES, *ET AL.*,

Petitioners,

v.

PPL ENERGYPLUS, LLC, *ET AL.*,

Respondents.

CPV MARYLAND, LLC,

Petitioner,

v.

PPL ENERGYPLUS, LLC, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE*, NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE COUNCIL OF STATE GOVERNMENTS, IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are organizations whose members include state governments and officials from across the country. *Amici* are concerned about preserving the constitutionally-required balance of authority between federal and state governments.

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

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1. The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs in this case. Pursuant to this Court's Rule 37.6, *amici* state that no party or counsel for a party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, has made a monetary contribution towards the preparation or submission of this brief.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. CSG offers regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

This case involves the interaction between state and federal authority to regulate the electric power market. *Amici* advocate the interests of state governments and the role of the States in a productive partnership with the federal government. *Amici*, thus, have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

Under our constitutional system of dual sovereignty, the doctrines governing federal preemption attempt to strike a proper balance between the broad residual and reserved powers of the States and the circumscribed powers of the federal government. The Fourth Circuit's ruling threatens this balance.

The founding fathers proposed a "government [that] cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." *The Federalist No. 39* (James Madison). In this

system, "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere." *Id.* Cooperative federalism draws on distinct state and national powers to take full advantage of the respective expertise of each level of government, to promote flexibility, and to optimize outcomes by encouraging dialogue and coordination between state and federal actors. Cooperative federalism thus "situates uniformity and finality for first-order norms at the national level, while allowing dialogue and plurality at the level of state implementation of those norms." Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 Whittier L. Rev. 161, 164 (2014).

Inherent in this system of concurrent regulation is a degree of complexity. Grappling with the needs of the many parties involved and the many interests at stake at the national level is a role suited to Congress, which is uniquely situated to determine whether, and how much, federal oversight (within its Constitutional power) is necessary over areas properly and historically controlled by the states. This is why Congress's intent in passing a federal law is the backbone of all preemption analysis, and why this Court has repeatedly cautioned against hypothesizing Congress's preemptive intent where clear evidence of it cannot be found. Indeed, "[t]he subjects of modern social

and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

The Fourth Circuit misapplied this Court's precedent urging caution and demanding clear evidence of congressional intent to occupy a regulatory field, particularly when the field is one historically occupied by the States. Where Congress's preemptive intent is not clear on the face of a statute, it may be inferred only in limited circumstances. This high threshold is necessary to protect the delicate workings of our system of dual sovereignty. A presumption against preemption exists for this very reason. In the absence of an explicit statement by Congress of its intent to displace traditional powers of the States, courts should assume Congress meant to preserve state sovereignty.

An even higher threshold should apply when courts are asked to infer Congress's preemptive intent from the actions of an agency that Congress vested with regulatory authority. In these circumstances, courts are instructed to search for both a clear indication from the agency that it intended to occupy the field *and* the necessary grant of authority from Congress to do so. In this case, the Fourth Circuit found federal field preemption without identifying any affirmative statements or

actions by either Congress or FERC indicating an intent to occupy the field.

The Fourth Circuit's unfounded holding on field preemption sets a dangerous precedent. Here, Congress and FERC expressed no intent to displace involvement by the States in the regulatory field. To the contrary, Congress expressly reserved a role for the States. The regulations challenged in this case were directed at fulfilling precisely the role that Congress intended for the States. The fact that such regulations might interact with or have incidental effects on the federal agency's regulatory activities does not provide a basis for supplanting state regulation in the sphere that Congress reserved to it. Cooperative federalism assumes — and thrives on — interaction between regulatory regimes. The model would have little utility if courts followed the Fourth Circuit in finding preemption any time a state regulatory action interacts with federal regulation.

The Fourth Circuit's finding of conflict preemption likewise flowed from overzealous application of preemption principles. There are two proper bases for a finding of conflict preemption: if compliance with both the state and federal laws is impossible; or if a state law poses an obstacle to federal objectives. Neither applies here.

Where Congress puts into place an interlocking scheme of federal and state regulation, courts considering preemption claims must proceed with the greatest degree of caution. Despite noting

the inevitability of tensions in interlocking systems such as the one under the Federal Power Act, 16 U.S.C. §§ 791-828c ("FPA"), the Fourth Circuit sought out potential tension between FERC's policies and the Generation Order, and found conflict preemption based on that tension. This open-ended approach, which will always favor a preemption finding, is inconsistent with Congress's careful balancing of state and federal powers.

Implying federal preemption of state authority without the clear intent of Congress is detrimental not only to the regulatory scheme established by Congress in the FPA, but to any regulatory scheme of cooperative federalism. The misapplication of both field and conflict preemption disrupts a well-functioning regulatory program under which it is possible to comply with both federal and state standards. The Fourth Circuit's ruling undermines traditional state authority, eliminates the benefits of cooperative federalism, and threatens not only the dual federal-state scheme in the FPA, but many other similar regulatory frameworks.

ARGUMENT

I. THE FOURTH CIRCUIT'S OVERBROAD APPLICATION OF FIELD PREEMPTION CONFLICTS WITH THIS COURT'S JURISPRUDENCE AND UNDERMINES COOPERATIVE FEDERALISM

"The exercise of federal supremacy is not lightly to be presumed." *Dublino*, 413 U.S. at 413 (quoting *Schwartz v. Texas*, 344 U.S. 199, 203 (1952)). In the absence of express federal intent to bar state regulation in an area subject to the federal government's authority, courts may infer legislative intent to occupy an entire field only if either: (1) "the scheme of federal regulation is sufficiently comprehensive [that it leaves] *no* room for supplementary state regulation"; or (2) "the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (emphasis added) (internal quotation marks omitted); *see ONEOK, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S. Ct. 1591, 1595 (2015).

In analyzing the comprehensiveness of federal regulatory schemes or the dominance of the federal interest, three well-established principles limit the circumstances in which a federal regulation implicitly prohibits all concurrent state activity in the same area. First, field preemption is presumed not to apply when the challenged state regulation

falls within an area traditionally regulated by the police powers of the States. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Hillsborough*, 471 U.S. at 715; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Second, field preemption may not be inferred solely from comprehensive regulation by a federal agency. *Hillsborough*, 471 U.S. at 717. Third, field preemption should be rejected where Congress has reserved a role for the States, and the challenged state regulation is directed at fulfilling that role. *ONEOK*, 135 S. Ct. at 1599-1600. Each of these limitations on field preemption applies in this case.

A. The Presumption Against Preemption Applies To Regulation Of Utilities, Which Falls Within The Historic Police Power Of The States

This Court first articulated the presumption against preemption in *Rice v. Santa Fe Elevator Corp.* Under *Rice* and its progeny, courts analyzing questions of field preemption should begin with a presumption that Congress did not intend to fully displace state exercise of powers traditionally belonging to the States. *See Medtronic*, 518 at 485 (Courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting *Rice*, 331 U.S. at 230)). If a challenged state regulation falls within the historic police powers of the States, then a court should determine whether the presumption

against preemption has been rebutted by "clear and manifest" Congressional intent to preempt the field. *See Rice*, 331 U.S. at 230.

This Court has held that regulation of local utilities, including the ability to direct contracting decisions of local utilities and to support new power generation, is within the States' traditional domain. *See, e.g., Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."). Because the challenge in this case relates to state regulation of the contracting activities of local utilities under the supervision of a state regulatory body the Fourth Circuit erred by not applying the presumption against federal preemption.

Protecting our constitutional system of dual sovereignty requires a high threshold for establishing the congressional intent necessary to displace any involvement by the States in areas in which they have traditionally regulated. To rebut the presumption against preemption, it is necessary to show that Congress unambiguously manifested its intent to supplant the entirety of state law in the area. *Rice*, 331 U.S. at 230.

In *Rice*, for example, the Court held that Congress unambiguously intended to supplant the States' regulatory regimes with the federal scheme. In that case, Congress amended a statute to vest the Secretary of Agriculture with exclusive authority over the regulation of federally-licensed warehouses, which traditionally and under the original act had been primarily regulated by the States. *Id.* at 222. In so doing, Congress removed from the federal law both an express incorporation of state licensing laws and a "savings provision" that had rendered federal regulations subordinate to state law. *Id.* (noting that Congress removed from the statute the language, "nothing in this act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any state relating to warehouses [or] warehousemen."). These amendments supported an unmistakable inference that Congress intended to occupy the field. *Id.* at 232-33. In most instances, however, there is no basis to infer that kind of unambiguous and manifest intent. *See, e.g.*, *Hillsborough*, 471 U.S. at 718 ("Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.").

In this case, there is no dispute that electric power generation and local electric utilities have

traditionally been regulated by the States. *See, e.g.*, *Ark. Elec. Coop. Corp.*, 461 U.S. at 377; *Pac. Gas & Elec. Co.*, 461 U.S. at 205. Nor is there unambiguous evidence of Congress's manifest intent to supplant the States' regulation in the field. The Fourth Circuit, therefore, erred by failing to apply the presumption against preemption.

B. Complex And Extensive Federal Agency Action Does Not Establish Congress's Intent To Displace All State Regulation

The FPA and the regulations promulgated thereunder embody a detailed and complex regulatory scheme. The mere fact, however, that a federal agency has adopted detailed or comprehensive regulations within a field cannot be sufficient to demonstrate federal preemption of the entirety of that field. As the Court explained in *Hillsborough*:

> We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with

> the federal-state balance embodied in our Supremacy Clause jurisprudence.

471 U.S. at 717. Rather, an inference of field preemption based on the comprehensiveness of federal agency regulations should require, at a minimum, a clear demonstration that Congress gave the agency the authority to completely preempt state law, and an unambiguous indication that the agency intends to supplant state regulation. Here, it is clear that FERC has given no indication that its intent was to preempt the field (even assuming it had the authority to do so).

Far from evincing congressional intent to preempt the field, the federal statute embraces a state role in the regulatory scheme. Congress, through enactment of the FPA, vested FERC with exclusive authority over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," but provided that "Federal regulation . . . extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). The FPA also limits FERC's authority by providing, with certain specific exceptions, that FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy." *Id.* § 824(b)(1).

No agency rule could alter this preservation of state authority mandated by the FPA. Even if it could, there is no unambiguous evidence that FERC intended its regulations to be so all-encompassing

that they would leave no room for regulation by the States. Agencies have numerous opportunities to pronounce their preemptive intent. While such a pronouncement is not — and should not be — dispositive in favor of preemption, the absence of any formal policy or rule announcing an intent to displace state regulation should preclude a finding of field preemption. *See Hillsborough*, 471 U.S. at 718. As a result, in the face of an agency's silence about superseding state authority, a court should "pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt." *Id.* And, where there is a *statutory* recognition of the coexistence of state and federal regulation in a given field, the comprehensiveness of an agency's regulations should seldom be sufficient to infer federal preemption of the entire field. The Fourth Circuit's finding of field-preemptive comprehensiveness in these circumstances upsets the careful balance between federal and state powers embodied in the FPA and similar statutory schemes.

C. Field Preemption Should Not Be Inferred When Congress Has Reserved A Role For The States And The Challenged State Regulation Is Directed At Fulfilling That Role

An inference that Congress intended to occupy a particular field must be based on "an unambiguous congressional mandate to that effect." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147

(1963). Supporting such an inference is straightforward when Congress has stated that it intends to completely preempt state law. Where, as here, however, Congress has by its very words stated the opposite — that federal law is intended to work in tandem with state law — a court should give "full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme." *California v. FERC*, 495 U.S. 490, 497 (1990). Finding preemption of a field in which Congress reserved a role for the States undermines the principle and practice of cooperative federalism.

1. The establishment of a dual state-federal regulatory scheme generally precludes an inference of field preemption

The establishment of a cooperative federal-state regulatory scheme, on its face, provides compelling (if not dispositive) evidence against the proposition that Congress intended to occupy the field. *See, e.g., Dublino*, 413 U.S. at 421 ("Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."). Here, Congress established a system of cooperative federal and state regulation. The FPA clearly reserves to the States a substantial regulatory role — including specifically the areas of electricity generation and supply-side acquisition. Further, the FPA provides

that federal regulation of transmission and wholesale sale of electric energy shall "extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).[2]

There is no basis to conclude, therefore, that FERC has the authority or has indicated an intent to displace state authority over generation capacity or local utility contracting. To the contrary, Congress withheld authorization to FERC "to order the construction of additional generation or transmission capacity." *Id.* § 824o(i)(2). FERC's regulations of wholesale rates are focused on "[w]holesale *sales*" and make no mention of regulating generation facilities — despite the obvious effect that an increase or decrease in generation capacity can have on wholesale pricing. 18 C.F.R. §§ 35.36-35.42 (emphasis added). It is not surprising, therefore, that FERC itself has acknowledged that its minimum offer price rule applicable to its wholesale

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2. The FPA expressly preserves state powers in several savings provisions: Section 824k "Orders requiring interconnection or wheeling" provides at (h) that "[n]othing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer." Section 824c "Issuance of securities; assumption of liabilities" provides at (f) that "[t]he provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission." Additional provisions in Section 824o ("Electric reliability") and Section 824a-1 ("Pooling") explicitly allow for side-by-side state and federal regulation.

capacity auctions "does not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state." *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, P 89 (2011). Finding a federal intent to occupy the field in the face of such specific carve-outs would violate the well-established principle that the question of statutory intent "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (citing *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)).

2. Where a State acts within the regulatory sphere reserved to it, there can be no inference of field preemption

Evidence that Congress did not intend to preempt state regulation within a field is even stronger when Congress has divided the regulatory field and the challenged state activity is directed to the area that Congress reserved to the States. In *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989), this Court held that state regulation of the timing of natural gas production was not preempted by the Natural Gas Act, which regulated the purchaser side of the transaction. 489 U.S. at 510, 513. In finding no preemption, this Court ruled that

the state regulations targeted "protect[ing] producers' correlative rights — a matter firmly on the States' side of th[e] dividing line" drawn by the Natural Gas Act between federal and State regulatory territories. *Id.* at 514. Just last term, this Court reiterated this principle in rejecting a field preemption challenge to the applicability of state antitrust laws to practices affecting retail rates for natural gas, which the court concluded were "firmly on the States' side of that dividing line." *ONEOK*, 135 S. Ct. at 1600.

The challenged activity in this case likewise falls firmly on the States' side of the FPA's division of regulatory authority between the federal government and the States. The FPA and FERC's rules authorize the States to plan for and incentivize new generation facilities. The CfD program provides assistance for new capacity generation by assuring the long-term revenue stream necessary to support the massive investment in new power plants. It does so through a state-directed hedging mechanism that affects only the net revenue the producer ultimately receives, not the price PJM pays in the wholesale auction market. This activity falls on the States' side of the "dividing line." There is no basis to find field preemption.

The Fourth Circuit departed from this straightforward analysis of whether Maryland had regulated on its side of the dividing line between federal and state power. The court instead searched for potential effects that Maryland's regulations

might have on the federal side of that dividing line —*i.e.*, regulation of wholesale rates. *PPL EnergyPlus LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014). But the fact that a state regulatory action may have effects in the federal regulatory sphere cannot be the basis for field preemption in an interlocking federal-state regulatory system like that under the FPA. This expansive "potential effects" approach to finding field preemption imperils the continued vitality of cooperative federalism.

3. Incidental effects of state action on the federal sphere do not support an inference of field preemption

The mere possibility that state regulation could result in collateral or incidental effects on federally-regulated matters will be present in virtually every case and should not provide a basis for finding field preemption. *See, e.g.*, *Nw. Cent. Pipeline Corp.*, 489 U.S. at 514 ("[T]here can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations."); *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) ("The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."). As the Court recognized in the context of the Natural Gas Act, although Congress assigned regulation related to natural gas wholesale purchasers to the federal

government, to find field preemption based on some incidental effect on that sphere would "nullify that part of the [federal statute] that leaves to the States control over production." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 514.

In the FPA, Congress established a regulatory scheme in which the federal government and the state government have authority over different aspects of the electric power market. Because the electric power market is interconnected, federal regulatory action regarding interstate transmission and wholesale pricing necessarily affects areas of state authority (such as retail pricing and power generation); likewise, state regulatory action regarding production capacity necessarily affects wholesale pricing. Such interaction is inherent in the regulatory structure established by the FPA, by its sister statute, the Natural Gas Act, and by similar legislation establishing concurrent federal-state regulation. It would be inconsistent with FPA's regulatory structure to conclude that Congress intended to supplant state regulatory actions in the sphere reserved to the States whenever those actions have any incidental effect on the federal sphere. That outcome would tie the States' hands in exercising the regulatory authority reserved to them by Congress.

In this case, Maryland's Public Service Commission ("MPSC") determined — as the FPA entitled it to do — that the State required additional generation capacity to assure the State's energy

needs over the long term. Recognizing that developers will not be able to build (or finance) a new power plant without long-term assurance of a stable revenue stream, the MPSC required that local utilities enter into long-term contracts with the developer of new generation capacity, and that those contracts between the local utilities and the generator include a hedge to protect the generator's revenue stream against ups and downs in the wholesale market price, while at the same time minimizing the cost to the state's ratepayers.[3] Both the means and objectives were unquestionably within the limits of the regulatory authority allocated to the States by the FPA.

Of course, as with any subsidy of new generation capacity, the MPSC's actions had the potential to affect the wholesale market for electrical energy and capacity. Indeed, FERC recognized that the Generation Order could provide the new generation facility with a cost advantage in the wholesale capacity auction, and thus took action to eliminate potential effects of that advantage on the wholesale market. That is exactly how a federal-state cooperative regulatory scheme is supposed to

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3. As the MPSC argues, the CfDs would have been subject to review by FERC for lawfulness in the ordinary course had the decisions of the courts below not rendered the contracts a "substantive nullity." Br. for No. 14-614 Pet'rs at 23 (citing *CPV Shore, L.L.C.*, 148 FERC ¶ 61,096, PP 28, 30 (2014)). By finding preemption, the courts below thwarted all of the parties' roles — including FERC's — in the carefully crafted regulatory framework.

work. The Fourth Circuit's holding that federal regulation preempts the field in these circumstances would throw a monkey wrench into the smooth working of these kinds of federal-state regulatory schemes.

Even if one reads the Fourth Circuit decision as holding that federal law preempts part of the field — *i.e.*, sub-field preemption — the decision would render federal-state cooperative regulatory programs unworkable. Neither the federal government nor the state government would know where the federal sub-field ends and the state sub-field begins. No state could be sure when its regulatory actions, despite appearing to be within the sub-field reserved to it, nevertheless unconstitutionally intrude into the federal sub-field (in part because there is no clear delineation between the sub-fields due in part to the inherent overlap and interaction, and in part because there is no workable test for sub-field preemption). Every state action that has any effect on the interstate power market would soon be subject to preemption challenges by market participants (just as Maryland's actions in this case were challenged by CPV Maryland's competitors), engendering uncertainty and delay.

As the Court stated in *Northwest Central Pipeline*, "we must be careful that we do not by an extravagant mode of interpretation" "encroach[] on the powers Congress intended to reserve to the States." 489 U.S. at 512 (internal quotation marks and alterations omitted). When a state takes

regulatory action directed at matters within its exclusive sphere of regulatory authority — such as assuring sufficient generation capacity within the state over the long term — any impact on matters within the federal sphere of authority is incidental to the state's appropriate exercise of authority. The design of the FPA provides the federal government with the means of neutralizing or modifying such incidental effects if it wishes to do so — as, for example, it did in this case.

Courts should be extraordinarily reluctant to apply field preemption to supplant state regulation in an area where Congress established a cooperative federal-state regulatory approach, thereby demonstrating that it did *not* intend to occupy the field.[4] In these kinds of regulatory schemes, the only

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4. The Fourth Circuit's reliance on *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963) and *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), for the proposition that state actions that affect matters within federal control are field preempted, misses the mark. *PPL EnergyPlus*, 753 F.3d at 475-76. This Court found preemption in those cases because it concluded that the state actions were aimed directly at wholesale purchasers and interstate commerce, fields exclusively in the federal domain. *See ONEOK*, 135 S. Ct. at 1599-1600 (discussing and distinguishing *Schneidewind* and *Northern Natural*); *Nw. Cent. Pipeline Corp.*, 489 U.S. at 513-14 & n.10 (same). Here, by contrast, while the federally-regulated sphere encompasses wholesale rate setting, the state action (planning for and incentivizing new capacity entry) is not directed at the federal agency's exclusive domain.

questions should be whether the state regulation at issue aims squarely at a target on the States' side of the dividing line, and if it does, whether it conflicts with federal regulation. As we show in Section II, there is no basis to apply conflict preemption in the circumstances of this case.

II. THE FOURTH CIRCUIT'S CONFLICT PREEMPTION ANALYSIS IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND UNDERMINES COOPERATIVE FEDERALISM

What is commonly referred to as conflict preemption requires an "*actual* conflict" between state and federal law. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (emphasis added). There is no preemption where conflicts between state and federal law are hypothetical. "A free wheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment); *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (finding no conflict preemption despite appellants' argument that compliance with state law might cause them to violate federal law). In *Exxon*, the Court noted that, "in this as in other areas of coincident federal and state regulation, the teaching of this Court's decisions enjoins seeking out conflicts between state

and federal regulation where none clearly exists." 437 U.S. at 130 (internal quotation marks and alterations omitted). Consistent with these principles, conflict preemption operates to invalidate state law only if: (1) compliance with both state and federal law is impossible; or (2) "the state law stands as an obstacle to the accomplishment and execution of congressional objectives." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 509. Neither circumstance is present here. To the contrary, the Fourth Circuit's expansive rationale for finding conflict preemption defeats, rather than protects, Congress's objectives.

As an initial matter, there is nothing impossible about compliance with both federal and state laws in this case, as demonstrated by the fact that FERC's own rules operated to ensure that the state program did not adversely affect the wholesale capacity auction. FERC subjected wholesale capacity bidders to its minimum offer price rules to keep the state programs from "disrupting the competitive price signals" in the auction. *PJM*, 137 FERC ¶ 61,145, P 3. FERC acknowledged that it is possible to comply with both the federal and state laws at issue. It recognized, for example, that: (1) a bidder who clears the auction "at a price above its offer floor is needed and considered a competitive resource and should be permitted to participate in the auction without an offer floor regardless of whether it also receives a subsidy," *id.* at P 133; (2) a bid that has cleared the auction "does not artificially suppress market prices," *PJM Interconnection,*

L.L.C., 135 FERC ¶ 61,022, P 175 (2011); and its minimum offer price rule "does not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state," *PJM*, 137 FERC ¶ 61,145, P 89 (2011). It is, therefore, unsurprising that the Fourth Circuit treated conflict preemption based on impossibility as irrelevant to its conflict analysis and instead focused its attention on a perceived interference with congressional objectives. *PPL EnergyPlus*, 753 F.3d at 478.

There is no basis to find conflict preemption based on obstruction. Where there is an interlocking scheme of federal and state law, courts should not seek to upset the balance carefully wrought by Congress, and, in fact, should infer that Congress concluded that state regulation would not obstruct the federal regulatory goals. *See, e.g.*, *CTS Corp. v. Waldburger*, ___ U.S. ___, 134 S. Ct. 2175, 2188 (2014) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)) (internal quotation marks and alterations omitted)). In enacting the FPA, Congress legislated in a field traditionally regulated by the States, and specified that regulatory authority will be shared by federal and

state governments. Congress constructed a scheme in which federal and state powers are meant to coexist, even though there inevitably will be occasional incidental conflicts. *See Nw. Central Pipeline Corp.*, 489 U.S. at 514-15 (discussing similar division of regulatory authority in the Natural Gas Act).

Notwithstanding the precedent requiring courts to tread lightly and to "sensitively" apply the conflict-preemption analysis to interlocking federal-state schemes, the Fourth Circuit found that Maryland's CfD program obstructed the goals of FERC's regulation of wholesale markets. *PPL EnergyPlus*, 753 F.3d at 479. The Fourth Circuit characterized FERC's refusal to extend the New Entry Price Adjustment program ("NEPA") beyond its current three-year time frame as a federal policy against longer-term capacity pricing programs, and thus found that Maryland's CfD program, which looks forward 20 years, conflicted with the federal regulation. *Id.* In so holding, the Fourth Circuit hypothesized a conflict where one does not exist.

FERC crafted rules governing the implementation of its wholesale capacity auction.[5] One such rule, FERC's NEPA price guarantee, operates *within* the federal auction framework to

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5. As discussed above in the impossibility preemption context (at 24-25, *supra*), FERC constructed the minimum offer price rule to keep state programs from disrupting competitive price signals, thereby thwarting any potential to obstruct federal goals. *PJM*, 137 FERC ¶ 61,145, P 3.

provide new market entrants a footing in the competitive bidding process. Maryland, on the other hand, identified a separate procurement-related need and addressed it through the CfD program, which operates *outside* the auction to directly attract new market entrants by ensuring the minimum revenue stream necessary to support the huge investment required. The CfD program in no way obstructs the goals of the federal program. If anything, it complements and furthers the goals of FERC's auction, which FERC acknowledged need not be the exclusive source of incentives for encouraging generating capacity. *See, e.g.*, *PJM*, 137 FERC ¶ 61,145, P 89.

Finally, even though some tension may exist between state and federal laws in an interlocking regulatory sphere — which is not the case here — conflict preemption is appropriate only if a state attempts to legislate beyond the scope of the powers reserved to it by Congress. "Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 131 S. Ct. 1968, 1981 (2011) (finding no preemption over Arizona state licensing laws enacted pursuant to the Immigration Reform and Control Act and noting that "Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws"). Where, as here, Congress

has reserved power to the States, the Court must look to the scope of the savings clause and other provisions preserving state authority, and determine whether the state regulatory action falls within that scope.[6] The CfD program falls squarely within the authority reserved to the States to "ensure the safety, adequacy and reliability of electric service within that State." 16 U.S.C. § 824o(i)(3). Maryland's intent was to ensure new construction of power generation, a power specifically denied to FERC by 16 U.S.C. § 824o(i)(2).[7] Insofar as the CfD program was within Maryland's power to create, it is not conflict preempted, even if there were tension with federal regulation.

III. THE FOURTH CIRCUIT'S HOLDING RENDERS COOPERATIVE FEDERALISM UNWORKABLE

The reasoning underlying the Fourth Circuit's holding on both field and conflict preemption, if allowed to stand, would prove toxic to the operation

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6. Where the text of an express preemption clause is susceptible of more than one plausible reading, courts "have a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Likewise, the presumption against preemption in areas of traditional state regulation usually counsels against a preemption finding. *Rice*, 331 U.S. at 230.

7. 16 U.S.C. § 824o(i)(2) provides, "This section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services."

of statutes and regulations modeled on cooperative federalism. The Fourth Circuit's rationale undermines the significant benefits of cooperative federalism. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981) (describing "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs").

First, cooperative federalism allows for adaptability and flexibility in the implementation of statutes and regulations. When Congress enacts a statute modeled on cooperative federalism, it can allow states with different needs to develop different programs to meet the policy goal of their own regulatory authority while helping to implement the mandates of federal law. By giving state governments the flexibility to act within certain spheres, cooperative federalism maximizes the extent to which regulation can adapt in the face of changing circumstances. *See, e.g.*, Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 Denv. U. L. Rev. 791, 800 (2008) (explaining how cooperative federalism can promote flexibility and experimentation in the context of environmental legislation); Philip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 Mich. St. L. Rev. 727, 735-37 (2003) (describing various cooperative federalism strategies for

implementing the Telecommunications Act of 1996 to promote flexibility for the states).

Second, cooperative federalism allows for dialogue between state and federal governments, thus providing an avenue for the governments to work together towards an optimal outcome. The wider the scope that courts allow for cooperative federalism to operate, the greater the extent to which the state and federal governments will be able to move in tandem to optimize the federal and state regulation objectives without the need for costly and inefficient judicial intervention. Cooperative federalism is crucial in complex areas where the state and federal governments must balance an array of interrelated or competing concerns. Cooperative federalism is an especially important tool in the regulation of electricity markets, which "can be viewed as an optimization problem involving several objective functions: balancing electricity supply and demand; minimizing consumer prices; and minimizing environmental costs." Tina Calilung, *The Clean Power Plan: An Introduction to Cooperative Federalism in Energy Regulation*, 4 Am. U. Bus. L. Rev. 323, 323 (2015).

Third, statutory schemes that provide for interlocking state and federal regulation promote efficiency by allowing the federal government to issue broad directives, while empowering the States to work out the details of implementation within the boundaries set by Congress or the federal regulatory agency. By enacting a statute modeled on

cooperative federalism, Congress saves considerable time and effort because it does not have to anticipate contingencies that might arise in the implementation of a statute or to enact detailed provisions addressing those contingencies. Instead, Congress can provide a general framework while leaving it to the States to work out the details of implementation. Meanwhile, state governments are able to implement the statute in the manner that best meets each state's needs and best utilizes its resources. *See* Bader, *supra*, at 161.

This case illustrates the benefits of cooperative federalism. Here, the MPSC acted to fulfill its responsibility to ensure — over the long-term — an adequate and reliable supply of electricity. It made a determination that the particular circumstances within its state presented a need to incentivize production of additional electric capacity, and it implemented a state-sponsored program that would meet that need. In response, FERC acted within its sphere to set rules for the state-sponsored generation facility's participation in the wholesale bidding and rate-setting process. The state and federal governments each acted within the field allotted to them by the FPA, and in doing so achieved an outcome that served both Maryland's need for an adequate supply of electricity and preserves FERC's prerogative to review the reasonableness of retail rates, without in any way disrupting the FERC-sponsored wholesale capacity auction and its attendant capacity signaling. This is

exactly how the regulatory scheme is supposed to work.

The Fourth Circuit's reasoning, however, suggests that, when a statute carves out one part of a regulatory field for the federal government and another part of the field for the States, the States are preempted from acting within their assigned area whenever that action has effects that may require reactive action by the federal regulatory agency. *PPL EnergyPlus*, 753 F.3d at 479 (reasoning that "[t]he fact that FERC was forced to mitigate the Generation Order's distorting effects using the [minimum offer price rule], however, tends to confirm rather than refute the existence of a conflict"). The Fourth Circuit's decision would make it virtually impossible to realize the benefits of cooperative federalism, which relies on interaction and dialogue between the federal and state governments, and necessarily accepts that the state and federal regulations may affect one another.

The FPA entrusts the States with responsibility for "ensur[ing] the safety, adequacy, and reliability of electric service," 16 U.S.C. § 824o(i)(3). The Fourth Circuit's reasoning, however, effectively strips Maryland of its ability to ensure that its residents have an adequate supply of electricity, because any attempt to incentivize the production of additional capacity will have at least an incidental effect on the costs of a participant in the federally-regulated wholesale market. The Fourth Circuit reached this result even though it is

difficult to imagine a state-sponsored method of incentivizing electric power generation that is less intrusive in the federally sponsored wholesale auction. Under the Maryland program, the ratepayers' subsidy to the generator is limited to the least amount necessary to incentivize the construction of the generation facilities. The alternatives that the Fourth Circuit suggested might survive judicial review — offering direct subsidies or tax rebates, *PPL EnergyPlus*, 753 F.3d at 478 — would not be targeted to produce exactly as much revenue as is necessary and would almost certainly be more costly to Maryland's ratepayers.

Nor would those alternatives have allowed FERC to take measured action to adjust its own program in response to the effects of Maryland's action. As this Court has observed, "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 514. The existence of such incidental effects does not support a conclusion that Maryland's regulatory program cannot constitutionally coexist with the federal regulatory scheme.

There are many other examples of statutory schemes involving cooperative federalism where there is overlap between state and federal regulation. For instance, in the Clean Air Act, Congress authorized the EPA to set standards for air quality but reserved for the States the responsibility

to determine how to achieve those standards. *See* ***Bethlehem Steel Corp. v. Gorsuch***, 742 F.2d 1028, 1035-36 (7th Cir. 1984); Bader, *supra*, at 186-87. Likewise, the Telecommunications Act of 1996 gives the FCC the power to supervise state telecommunication agencies, but allows the state agencies to fill gaps and address issues left open by federal regulations. *See* Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L. Rev. 1, 31 (1999). If the Fourth Circuit's decision is allowed to stand, the viability of all these programs would be placed in jeopardy. The Fourth Circuit's expansive approach to preemption should be rejected in favor of the proper operation of cooperative federalism.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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